



Contra Costa County
Flood Control
& Water Conservation District

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April 17, 2012

U.S. Army Corps of Engineers
441 G Street, NW
Washington, D.C. 20314-1000
Attn: CECW-CE, Tammy Conforti
Via email: tammy.conforti@usace.army.mil

RE: Docket Number COE-2010-0007
Process for Requesting a Variance from
Vegetation Standards for Levees and Floodwalls

Files: 4006-22, 4007-22, & 72-09-01

Dear Ms. Conforti:

Thank you for continuing to work with the local sponsors to address public safety and environmental protection for local flood protection projects. We appreciate the opportunity to provide comments to the Corps and appreciate your efforts the past two years to address our concerns with the 2010 Vegetation Policy Guidance Letter (PGL). Although the revised February 17, 2012 PGL acknowledges the Corps has approved levee projects with vegetative components, and allows the possibility for a new vegetation variance, we would like to continue to work with the Corps to make the process more economical and practical, while providing the maximum public safety. Enclosed below are additional comments for your consideration before the PGL is finalized:

Background:

1. The Contra Costa County Flood Control and Water Conservation District (FC District) is the local entity in charge of operation and maintenance of several federally authorized flood control facilities constructed by the U.S. Army Corps of Engineers (Corps of Engineers) in Contra Costa County.

Among these facilities is the Wildcat and San Pablo Creeks Flood Control Project, authorized by the U.S. House of Representatives on June 9, 1976, and the U.S. Senate on June 15, 1976, in accordance with the recommendations of the Secretary of the Army and the Chief of Engineers in House Document 94-11. The project was authorized under section 201 of Public Law 89-298 (1965 Flood Control Act). Several of our comments on the variance policy use the Wildcat and San Pablo Creeks Flood Control Project as an example of the consequences of this new policy.

The Sacramento District of the Army Corps of Engineers prepared the Operations and Maintenance (O&M) Manual for the Wildcat and San Pablo Creeks Federal Flood Control Project, and it states that the San Francisco District has the responsibility for monitoring project operations and maintenance after construction. Construction was completed in 1987. The project levees have been inspected by the Corps of Engineers since the project was turned over to our agency in 1987. On August 3, 2009, and October 20, 2009, and again in 2011, we received inspection reports for the Wildcat and

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San Pablo Creeks Federal Flood Control Projects, which included recommendations to remove the trees from the levees. These recommendations have not been included in previous inspection reports, because the trees were authorized by the Corps of Engineers to provide shaded riparian habitat. The new policy guidance should allow an exception rather than a variance for the Wildcat and San Pablo Creeks vegetation and all levee vegetation previously authorized and acknowledged by the Corps of Engineers.

2. The Army Corps of Engineers has included Section 2-04 in the O&M Manual for the Wildcat and San Pablo Creeks Federal Flood Control Project, which states that mature vegetation will be maintained to provide a closed canopy over the creeks, creating shaded aquatic habitat. Exhibit G of the O&M Manual shows existing mature trees on the levees and adjacent to floodwalls. The Corps of Engineers designed the Wildcat and San Pablo Creeks project landscaping plan with trees and other vegetation planted on the project levees and adjacent to floodwalls to mitigate for losses to fish and wildlife habitat. Both of these levee systems are overbuilt and include root barriers. The new variance policy is in conflict with the Wildcat and San Pablo Creeks O&M Manual because approximately 50% of the project includes levees and floodwalls installed by the federal project, of which approximately 80% incorporates vegetation not in compliance with the Landscaping Guideline ETL 1110-2-571. The extensive planting plan is shown in the O&M Manual created by the Corps of Engineers. In Accordance with the Local Cooperation Agreement, the FC District is obligated to maintain the project in accordance with the O&M Manual. This project should therefore be exempt from any variance requirement.
3. Facilities constructed by the Corps of Engineers for local flood control protection are regulated by the [Code of Federal Regulations — Title 33: Navigation and Navigable Waters](#) 33 CFR 208.10 — Local Flood Protection Works. Section 10 (b) of Federal Regulation CFR 208.10 states, "Where practicable, measures shall be taken to retard bank erosion by planting of willows or other suitable growth on areas riverward of the levees." Landscape Guideline ETL 1110-2-571 and the Revised Variance Policy continue to conflict with federal regulation CFR 208.10. While CFR 208.10 encourages the planting of willows and allows willow plantings to be approved by the District Commander, a variance for existing vegetation already approved by the Corps requires a new, lengthy, approval at all levels of the Corps, including Corps Headquarters. We recommend that the Corps allow approval of vegetation variances by the District Commander only, which is consistent with CFR 208.10.
4. The Local Cooperation Agreement for the Wildcat and San Pablo Creeks project was executed with the Corps of Engineers on June 20, 1986, prior to the vegetation variance policy issued in 1997. Since the project has been maintained in accordance with the Maintenance Manual, there has been no variance from the approved Corps of Engineers plan. Therefore, this project, along with all projects constructed prior to the development of this new variance and maintained in accordance with an approved O&M Manual, should be considered exempt from the variance policy and ETL 1110-2-571.

5. The Pinole Creek Local Federal Flood Control Project was authorized by the Army Corps Chief of Engineers on June 14, 1963 under the provisions of Section 205 of the Flood Control Act of 1948, as amended by the Flood Control Act of 1962. The August 1966 Operations and Maintenance Manual, Section 7-5, states that the District Engineer or his authorized representative shall approve any improvements to the project. The Pinole Creek Project was originally designed and constructed by the Corps without adequate flood control capacity and the levees may not meet current Corps requirements. In April 2009 the Corps provided written approval for improvements which included sheet pile floodwalls and vegetation that do not meet the requirements of the ETL or the PGL. If we are required by this PGL to apply for a new variance for the work already constructed, it is likely that Corps HQ will not approve this variance. We cannot achieve a 15-foot clear zone on each side of the flood wall due to existing homes and other right of way constraints. Trees were already planted adjacent to the floodwalls which do not meet the requirements of the ETL. With sheet pile flood walls, it is not necessary to maintain a 15-foot vegetation clear zone, as the sheet piles act as root barriers to prevent damage that may occur from tree roots. Therefore, we request an exemption for the Pinole Creek floodwalls and the trees adjacent to the sheet pile floodwalls, rather than a variance, since this project was approved by the District Engineer in accordance with CRF 208.10.
6. It is stated in the PGL that the variance request process was developed to implement Section 202(g) of the Water Resources Development Act (WRDA) of 1996. Section 202(g) of WRDA requires that the Corps work with stakeholders to implement a variance process that takes into consideration regional differences in watersheds. Unfortunately, the February 17, 2012 version of the PGL does not yet fully consider the existing vegetation variances in California. California's Congressional delegation sent a letter to ASA Darcy on April 3, 2012 requesting that the Corps revise the PGL and continue to work with the local levee sponsors in California to develop a practical variance process. We agree that the Corps should delay finalizing the PGL and continue to work with the local sponsors, especially in the San Francisco Bay Area, which has different watersheds and would need a different regional variance than the Central Valley of California.

Draft Environmental Assessment (EA):

7. The Corps prepared a draft environmental assessment (EA) Finding of No Significant Impact (FONSI) for the PGL. It was determined that because the Corps is changing the process and procedures for requesting a variance, there are no changes in the environmental that will trigger impacts. We disagree that the PGL will not create environmental impacts. In the case of the Wildcat Creek levees, the Corps designed the project with trees on both the water and land sides of the levee, and we do not have an official variance in accordance with ER 500-1-1, Section 5-22 or ETL 1110-2-571. The revised PGL will require us or the local Army Corps office to apply for a variance many years after the vegetation on the Wildcat Creek levees was designed and approved by the Corps. If Corps Headquarters denies a variance for Wildcat Creek, we will be forced to remove the existing trees, or lose our PL 84-99 emergency funding. The environmental impacts for the removal of existing trees and

vegetation on flood control facilities with extensive fish and wildlife habitat will be significant. Since the Wildcat Creek levees are in an urban area, we cannot afford to lose PL 84-99 funding, therefore the ETL and the PGL may force us to remove the trees and this will cause significant environmental impacts. Again, we disagree that the Finding of No Significant Impact (FONSI) document is sufficient for this proposed action, and we request that the Corps of Engineers prepare a full Environmental Impact Statement prior to implementing the new policy guidance.

General Comments:

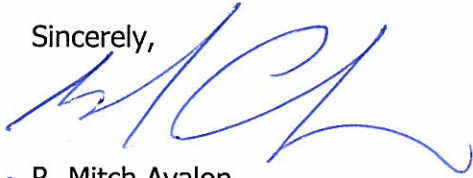
8. The revised PGL states that vegetation variances as defined in ETL 1110-2-571, are permitted only through a vegetation variance, approved by the HQUSACE LSO, via the process described herein. Application of this requirement to vegetation and plantings on levees that were originally mandated by the Corps of Engineers as part of the federal project, presents a new and contradictory policy that will create problems for the local sponsors due to the following:
 - A. Removing the trees and vegetation will cause us to be in violation of our original agreement with the Corps of Engineers for the construction and maintenance of the Wildcat and San Pablo Creeks federal flood control project.
 - B. For the Wildcat and San Pablo Creeks project, there was extensive community involvement in the design and installation of the vegetation and commitment to the community to maintain the vegetation. If the vegetation is removed to comply with the new Corps policy, the community may strongly protest and/or may take legal action against the FC District and the Corps of Engineers.
 - C. The new PGL will create environmental impacts and will require the nonfederal sponsor to prepare an environmental document for the removal of the vegetation. The Corps of Engineers' Regulatory Branch, the U.S. Fish and Wildlife Service, the Department of Fish and Game, and the Regional Water Quality Control Board will require mitigation for the impacts of the vegetation removal, which will be significant. This mitigation requirement will be very difficult and expensive to accomplish, with little likelihood of completely compensating for the major loss of habitat within the watershed, much less within the federal project itself.
 - D. These changes will require us to prepare an amendment to the O&M Manual.
9. The Wildcat and San Pablo Creeks project may not be the only federal project where the mitigation planting component, which was mandated and designed by the Corps of Engineers, is in conflict with the Corps of Engineers' Landscaping Guideline, ETL 1110-2-571. To ensure that this type of conflict will not cause the local sponsor undue burden, we request the following:

- A. The Corps of Engineers should not require the local sponsor to comply with the variance requirement in those cases where the approved federal project included vegetation in conflict with ETL 1110-2-571.
 - B. The Corps of Engineers should waive the requirement for the local sponsor to submit a request for an Agency Technical Review (ATR) to get a variance for vegetation plantings on levees. We assume that levee vegetation originally approved by the Corps is not a variance or a deviation from standards. That should be clarified in the policy guidance. However, if the Corps decides to retroactively declare previously approved vegetation on project levees as a deviation, we request an additional five years to obtain federal funding and to prepare the supporting documents for a variance. One year is not enough time for local sponsors prepare a vegetation variance request.
10. The new vegetation standards require that a minimum of 15-feet on both sides of a floodwall should be free of vegetation due to potential damage from falling trees and tree roots. We recommend that the Corps allow tree species with small trunk diameters and/or shallow roots to mitigate these concerns. The benefits of carefully planted trees and shrubs adjacent to floodwalls outweigh the potential risks. Vegetation along floodwalls provides aesthetic and riparian habitat benefits.
11. The 15-foot clear zone on each side of floodwalls is not available for most flood control projects in our jurisdiction. Existing right of way is limited for most projects. There may be less than 15-feet from the floodwall to the top of bank of the channel or from the floodwall to private property. Floodwalls are typically used when there is limited right of way. Our agency does not have funding to acquire property, condemn property, or relocate existing structures to expand the flood control projects to meet these new requirements. Existing federal flood control projects with limited right of way should be exempt from these requirements, and we should not be required to submit a vegetation variance.
12. The FC District should not be put in a situation, through no fault of its own, where it faces financial crisis due to the Corps of Engineers withdrawing support for disaster assistance under PL 84-99 or financial crisis resulting from the costs of implementing required mitigation to offset the loss of habitat values provided by federally planned landscaping installations.
13. The System-Wide Improvement Framework (SWIF) Policy currently requires the local sponsor to commit to a schedule to address and correct all deficiencies, assuming vegetation is a deficiency. The schedule requirement is very rigid, impractical, and cost prohibitive. We request that the SWIF be changed to allow local sponsors to first address the greatest levee risk factors without committing to bringing the levee into compliance with all Corps criteria. In addition, we request the SWIF be changed to allow vegetation to remain on levees and adjacent to flood walls where the vegetation provides erosion protection and shaded riverine habitat.

14. We do not agree with the Corps that vegetation is a risk factor in California, especially in the San Francisco Bay. In our experience in Contra Costa County, we have found that trees, shrubs, and vegetation root systems provide erosion control, and provide shaded riverine habitat. In Section 4-8 of ETL 1110-2-571, the Corps is allowing either perennial grasses, riprap, pavements, concrete matts, or other engineered surfaces for erosion protection. These new requirements are contrary to the Army Corps Regulatory Branch's well documented requirements to use trees and shrubs for erosion control, as an alternative to riprap. In Contra Costa County, grasses do not provide the necessary shear strength to resist erosive forces in most of our natural watercourses. And, grasses do not grow at the toe of the levees where the greatest erosive forces occur. In our region, willow trees grow naturally at the toe of the levee or creek bank and provide the needed protection. We recommend that Section 4-8 of the ETL be modified to allow willow trees for erosion control, and that willow trees are exempt from the PGL requirements.
15. The PGL states that the local sponsor must demonstrate that there is full accessibility for levee operations as a condition for variance approval. The Wildcat Creek levees are freeboard levees, which means the creek is an in-ground channel and the lower portion of the waterside levee is below ordinary high water. In this example, removing trees and shrubs within the vegetation free zone as shown in the ETL would eliminate shaded riverine habitat, eliminate erosion protection, and would not improve accessibility. We recommend that the PGL provide an exemption for all freeboard levees and for all levees protecting in-ground channels.
16. Section 11 of the PGL requires the local sponsor to provide all NEPA and ESA documentation for levee vegetation not in compliance with the ETL. We recommend that the Corps provide this documentation, or allow federal funding for the local sponsors.
17. Section VII of the PGL requires the levee sponsor to enter into a variance agreement, comply with new maintenance requirements imposed by Corps HQ, and be responsible for all ESA, NEPA, and regulatory requirements resulting from new vegetation maintenance requirements. We cannot afford to comply with new maintenance requirements, and the resulting regulatory mitigation that will be required for Wildcat, San Pablo, and Pinole Creeks. These federal projects should be exempt from any new maintenance and mitigation requirements as these projects were already approved by the Corps.

Thank you for the opportunity to provide comments to the variance policy. We really appreciate the Corps efforts to collaborate with the California local sponsors and hope we can continue to improve the PGL to allow vegetation where it provides public benefits. If you have any questions, please contact Mario Consolacion at (925) 313-2283 or me at (925) 313-2203.

Sincerely,


for: R. Mitch Avalon
Deputy Chief Engineer
Contra Costa County Flood Control
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RMA:MC:

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c: J. R. Bueren, Chief Engineer
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